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Attorney for *Defendant Robert A. Bisom*

IN THE UNITED STATES DISTRICT COURT
 FOR THE NORTHERN MARIANA ISLANDS

ROBERT D. BRADSHAW,

Plaintiff,

vs.

COMMONWEALTH OF THE NORTHERN
 MARIANA ISLANDS, NICOLE C. FORELLI,
 WILLIAM C. BUSH, D. DOUGLAS COTTON,
 L. DAVID SOSEBEE, ANDREW CLAYTON,
 UNKNOWN AND UNNAMED PERSONS IN
 THE CNMI OFFICE OF THE ATTORNEY
 GENERAL, ALEXANDRO C. CASTRO, JOHN
 A. MANGLONA, TIMOTHY H. BELLAS,
 PAMELA BROWN, ROBERT BISOM and JAY
 H. SORENSEN,

Defendants.

CASE NO. CV 05-00027

MOTION OF ROBERT A. BISOM
 TO QUASH SERVICE

Date: Thursday, September 7, 2006
 Time: 8:30 a.m.
 Judge: Hon. Alex R. Munson

NOTICE OF MOTION AND MOTION

Please take notice that on the 7th day of September, 2006, at 8:30 a.m. in the above-entitled Court located in the First Floor, Horiguchi Building, Garapan, Saipan, Commonwealth of the Northern Mariana Islands, or a soon thereafter as this matter may be heard, Robert A. Bisom, appearing specially through the undersigned counsel to challenge service of process, will and does hereby bring the following Motion to Quash plaintiff's defective service Pursuant to Fed. R. Civ. P. 4 and 12(b)(5). This motion is supported by the pleadings and records on file in this matter, by the supporting Memorandum incorporated herein and by the Declaration of Counsel submitted herewith. Robert Bisom submits this Motion to Quash for the limited purpose of challenging plaintiff's manner of service and

1 reserves the right to file a motion to dismiss on Fed. R. Civ. P. 12(b)(6) or other appropriate
2 grounds at a later time.

3 MEMORANDUM IN SUPPORT OF MOTION

4 I. INTRODUCTION

5 The plaintiff in this matter, Robert Bradshaw, is attempting to effect service of process
6 over Robert A. Bisom, among other defendants, by publication. Plaintiff's method of
7 substituted service is defective for at least two reasons.

8 First, plaintiff has failed to comply with the requirements of Fed. R. Civ. P. 4(f) with
9 regard to service on Mr. Bisom whom plaintiff is well aware has been a permanent resident of
10 Japan for many years now and is currently residing in Japan. Japan is a signatory to the
11 Convention for Service Abroad of Judicial and Extrajudicial Documents in Civil or
12 Commercials Matters, *concluded* Nov. 15, 1965, 28 U.S.C. (Appendix following Fed. R. Civ.
13 P. 4); 20 U.S.T. 361, T.I.A.S. No. 6638, 658 U.N.T.A. 163 (the "Hague Service Convention")
14 and Plaintiff must follow the appropriate procedures therein for service of process on Mr.
15 Bisom.

16 Second, plaintiff has not properly invoked the statutory authority to serve Mr. Bisom
17 by publication. Service by publication is a substitute method of service made available in the
18 Commonwealth by statute under particular factual circumstances in long-arm jurisdiction
19 cases. Plaintiff has not, nor could plaintiff, make the factual showing required that would
20 allow Plaintiff to use service by publication as a substitute for personal service in this matter.

21 Because plaintiff has not properly served Robert A. Bisom, his purported service by
22 publication should be quashed and plaintiff should be required to comply with the terms of
23 the Hague Service Convention.
24

25 II. FACTS RELEVANT TO THIS MOTION

26 1. Robert A. Bisom is an individual currently residing in Japan. *See* Declaration
27 of Robert A. Bisom filed in Case No. 05-84-N-EJL, United States District Court for the
28 District of Idaho, a true and correct copy of which is attached hereto. The Idaho proceedings

1 were dismissed for lack of jurisdiction and the present case was re-filed in this Court.

2 2. On November 18, 2005, this Court denied plaintiff's first motion to enter Mr.
3 Bisom's default, finding that Jay Sorensen was not Mr. Bisom's attorney in this matter and that
4 plaintiff's attempted service on Sorensen at Attorney Sorensen's address in California,
5 intended to obtain service on Mr. Bisom, was ineffective.

6 3. Undaunted, plaintiff filed for and obtained an order allowing plaintiff to serve
7 Mr. Bisom by publication notwithstanding plaintiff's prior knowledge, undisclosed by plaintiff
8 to the Court, that Robert Bisom resides in Japan, and notwithstanding that plaintiff's only
9 attempt to serve Robert Bisom otherwise had been by the defective service of a summons and
10 complaint on Jay Sorensen. *See* Motion to Serve Robert A. Bisom by Publication and Affidavit
11 in Support both filed December 9, 2005; Order dated January 13, 2006.

12 4. Plaintiff published his notice in the Saipan Tribune for four consecutive weeks
13 during which time no complaint was pending against Robert A. Bisom. *See* Order Re: Motions
14 Heard on June 8, 2006 at 4.

15 5. On June 8, 2006, this Court again denied a motion by plaintiff to enter Mr.
16 Bisom's default finding that service was defective. *Id.*

17 6. Thereafter, plaintiff again published a notice to Robert A. Bisom in the Saipan
18 Tribune for four consecutive weeks with the last publication thereof occurring on July 20,
19 2006. *See* Declaration of Counsel, ¶¶ 3-5, submitted herewith. Plaintiffs' publications relative
20 to Mr. Bisom occurred on June 29, July 6, July 13 and July 20. *Id.*

21 7. Japan is a signatory to the Hague Service Convention.

22 8. Plaintiff has never inquired of Mr. Bisom, Mr. Bisom's attorney in CNMI court
23 proceedings — Mr. Jay Sorensen (also a defendant herein), nor the undersigned of Mr.
24 Bisom's address and whereabouts in Japan. *See* Declaration of Counsel, ¶¶ 6-9.

25 III. ARGUMENT

26 Plaintiff has failed to comply with the provisions of Rule 4(f) requiring that plaintiff
27 serve Robert Bisom consistent with the provisions of the Hague Service Convention.
28

1 Additionally, and notwithstanding that service by publication is inconsistent with the
2 provisions of the Hague Service Convention as they apply to residents of Japan, plaintiff did
3 not properly demonstrate that he met the statutory requirements that would allow service by
4 publication on Robert A. Bisom in this case.

5 A. STANDARD FOR 12(b)(5) MOTIONS

6 *Pro se* litigants are held to the same procedural rules as counseled litigants. *See King*
7 *v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987). Pursuant to Federal Rule of Civil Procedure
8 12(b)(5), a complaint may be dismissed for insufficient service of process. “In considering a
9 motion to dismiss pursuant to 12(b)(5) for insufficiency of process, a Court must look to
10 matters outside the complaint to determine whether it has jurisdiction.” *Mende v. Milestone*
11 *Tech., Inc.*, 269 F. Supp. 2d 246, 251 (S.D.N.Y. 2003). “Once a defendant challenges the
12 sufficiency of service of process, ‘the burden of proof is on the plaintiff to show the adequacy
13 of service.’” *Howard v. Klynveld Peat Marwick Goerdeler*, 977 F. Supp. 654, 658 (S.D.N.Y.
14 1997) (internal quotations and citations omitted).

15 A. PLAINTIFF IS REQUIRED TO COMPLY WITH THE PROVISIONS OF THE
16 HAGUE SERVICE CONVENTION.

17 Federal Rule of Civil Procedure 4 governs the service of complaints in civil matters.
18 Rule 4(f) prescribes the necessary manner of service upon individuals residing in a foreign
19 country and states in pertinent part:

20 Unless otherwise provided by federal law, service upon an individual
21 from whom a waiver has not been obtained and filed . . . may be effected in any
22 place not within any judicial district of the United States . . . by any
23 internationally agreed means reasonably calculated to give notice, such as those
24 means authorized by the Hague Convention on the Service Abroad of Judicial
25 and Extrajudicial Documents.

26 Fed. R. Civ. P. 4(f)(1).

27 Initially, Mr. Bisom would note that service of process by publication is not an
28 internationally agreed upon means of service of process of a United States court on a resident

1 of Japan.¹ In any case, Japan is a signatory to the Hague Service Convention and Plaintiff
2 could and should effect service on Mr. Bisom through the methods prescribed therein.

3 With respect to service of process, great deference should be given to the Hague
4 Service Convention as “the ‘law of the land’ under the supremacy clause of the Constitution.”
5 *Cooper v. Makita, U.S.A., Inc.*, 117 F.R.D. 16, 17 (D. Me. 1987). *See also Ballard v. Tyco*
6 *Intern., Ltd.*, 2005 WL 1863492 at 2 (D. N.H.) (“The Hague Convention provides a mechanism
7 through which a plaintiff can effect service that will give appropriate notice to the party being
8 sued and will not be objectionable to the nation in which that defendant is served.”); *Golub*
9 *v. Isuzu Motors*, 924 F. Supp. 324, 328 (D. Mass. 1996) (requiring plaintiff to proceed under
10 the Hague Convention where there is a “reasonable prospect that the plaintiff will ultimately
11 be able to serve the defendant properly.”); *Borschow Hosp. & Medical Supplies, Inc. v. Burdick-*
12 *Siemens Corp.*, 143 F.R.D. 472, 478 (D. P.R. 1992) (discussing the duty of serving documents
13 in a manner consistent with the Hague Convention).

14 The United States Supreme Court in *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486
15 U.S. 694, 796, 108 S.Ct. 2104, 2111 (1988) confirmed that the Hague Service Convention
16 preempts inconsistent state law methods of service. In that case, the objecting defendant in
17 Germany was served by substituted service under the Illinois long-arm statute that did not
18 require the delivery of documents to Germany. More precisely, and what distinguishes service
19 their from the service by publication in this case, the German defendant was served in the
20 United States by personally serving its wholly owned, closely controlled U.S. subsidiary. *Id.*,
21 at 696, 2106. The majority upheld the service on the defendant’s domestic agent noting that
22

23 ¹ *See Eto v. Muranaka*, 57 P.3d 413, 424 n.8 (Hawaii 2002):

24 One commentator has said that, in Japan, “a Japanese defendant
25 must have received service of a summons or other necessary
26 orders to commence proceedings (other than by notice of
27 publication) or have responded in the action without receiving
28 service for the foreign judgment to be valid.” Kikuchi, Shin,
Enforcement of Money Judgments JAP-17 (Lawrence W.
Newman, ed., 1998) (citing MinsohO [Code of civil procedure],
art. 118(2)).

1 the particular form of substituted service did not controvert the Hague Service Convention
2 because service was accomplished domestically.

3 Justice Brennan, joined by two other justices, concurred in the decision, but criticized
4 the majority for too broadly wording its acceptance of substituted service of the forum state,
5 noting that other forms of substituted service would controvert the intent of the United
6 States' joinder in the Hague Service Convention. *Id.*, at 708-715, 2112-2117.

7 There is little doubt that substituted service on a foreign individual is authorized where
8 such service (1) is not prohibited by agreement with a foreign country and (2) is "reasonably
9 calculated, under all the circumstances, to apprise interested parties of the pendency of the
10 action and afford them an opportunity to present their objections." *Rio Properties, Inc. v. Rio*
11 *International Interlink*, 284 F.3d 1007, 1016-17 (9th Cir. 2002)(quoting *Mullane v. Cent.*
12 *Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950)). "Even if
13 facially permitted by Rule 4(f)(3), a method of service of process must also comport with
14 constitutional notions of due process." *Rio Properties, Inc.*, 284 F.3d at 1016.

15 However, before resorting to methods of substituted service that would, to a great
16 extent, circumvent the intent of the Hague Service Convention, Court's have articulated a
17 need for the plaintiff to make every effort to serve process by conventional means, including
18 attempts to serve through the Hague Service Convention. *See, e.g., Popular Enterprises, LLC*
19 *v. Webcom Media Group, Inc.*, 225 F.R.D. 560, 561 (E.D. Tenn. 2004) (finding it notable that,
20 in *Rio Properties*, it was "only after all these efforts failed that the plaintiff asked the district
21 court to allow e-mail service"); *Eto v. Muranaka*, 57 P.3d 413, 423-24 (Hawaii 2002) (service
22 by publication not prohibited "mere gesture" at service where a diligent effort is shown to
23 locate and serve overseas defendant through Hague Service Convention); *Trask v. Service*
24 *Merchandise Co., Inc.*, 135 F.R.D. 17, 22(D. Mass. 1991)("[T]he absence of at least a good faith
25 attempt to comply with the Hague Convention prohibits this court from applying the liberal
26 standards of Fed. R. Civ. P. 4 in analyzing the propriety of service. . .").

27 Here, as discussed below with regard to the Court's order allowing service by
28

1 publication and, specifically, the factual showing mandated by the CNMI statute allowing
2 service by publication, Bradshaw made little if any effort to serve Bisom by conventional means
3 and absolutely no effort to ascertain the present whereabouts and address of Mr. Bisom so that
4 he could serve Bisom through the Hague Service Convention. Consistent with other courts
5 who have consider various methods of substituted service, the Court should quash the present
6 service by publication and require Bradshaw to serve Mr. Bisom in Japan pursuant to Fed. R.
7 Civ. P. 4(f)(1) through the manner prescribed by the Hague Service Convention.

8 B. PLAINTIFF DID NOT MAKE A PROPER SHOWING PRIOR TO OBTAINING AN
9 ORDER TO SERVE BY PUBLICATION.

10 The fact that Bradshaw made absolutely no attempt to serve Mr. Bisom through the
11 Hague Service Convention and the complete absence of diligence and any justification for
12 Bradshaw's purported need to serve Mr. Bisom through the long-arm statutory provisions for
13 substituted service of CNMI law, warrant the Court's revisiting the issue of service on Mr.
14 Bisom in this case, quashing any purported service to-date, rescinding the order allowing
15 service on Mr. Bisom by publication, and requiring Bradshaw to serve Mr. Bisom in a manner
16 prescribed by the Hague Service Convention.

17 Title 7, Section 1102(b) of the Commonwealth Code provides that substituted service
18 may be made pursuant to the provisions of 7 C.M.C. § 1104 "if the person cannot be found
19 in the Commonwealth." Section 1104(b) states in full:

20 After service on the Attorney General, if the defendant cannot be personally
21 served by mail the summons and complaint, and if by affidavit or otherwise the
22 court is satisfied that with reasonable diligence the defendant cannot be served,
23 and that a cause of action arises against the party upon whom service is to be
24 made, or he is a necessary and proper party to the action, the court may order
25 that service be made by publication of the summons in at least one newspaper
26 published and having a general circulation in the Commonwealth. Publication
27 shall be made once each week for four successive weeks, and the last
28 publication shall be not less than 21 days prior to the return date stated herein.

26 Here, plaintiff did not demonstrate his efforts to properly serve Bisom; instead he relied
27 solely on his previously debunked, improper efforts to serve Bisom through defendant Jay
28 Sorensen, and Jay Sorensen's continuing communication with Robert A. Bisom, despite the

1 fact that he knows that Sorensen is not representing Bisom in this matter.

2 No other efforts whatsoever to serve Robert Bisom are identified in plaintiff's Motion
3 to Serve Robert A. Bisom by Publication and plaintiff's supporting Affidavit. Plaintiff did not
4 allege attempted service in any other place or in any other manner, by personal service, by
5 mail, by waiver, through the Hague Service Convention or otherwise. Indeed, Plaintiff did not
6 even allege that Robert A. Bisom cannot be found in the Commonwealth. *See* 7 C.M.C. §
7 1102(b).

8 Further, there was no demonstration by the plaintiff, and there was no express finding
9 by the Court, that a cause of action has arisen against Robert Bisom and in favor of plaintiff
10 that would satisfy the statutory requirement. Indeed, given the previous dismissals in this case
11 and the Court's recurring consideration of the efficacy of plaintiff's Second Amended
12 Complaint as it pertains to other defendants, it is at the very least questionable whether
13 Robert A. Bisom *should* be served by publication at this stage notwithstanding that the
14 plaintiff has failed to meet the statutory requirements that would otherwise allow such
15 substituted service were it not for the Hague Service Convention.

16 IV. CONCLUSION

17 In short, plaintiff has yet to effect proper service on Robert A. Bisom and, accordingly,
18 plaintiff's purported service by publication should be quashed and plaintiff should be required
19 to serve Robert A. Bisom pursuant to the terms of the Hague Service Convention.
20

21 Respectfully submitted this 10th day of August, 2006.

22 /s/ Mark B. Hanson

23

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Appearing Specially for Robert A. Bisom

CERTIFICATE OF SERVICE

I, Rowena de Vera, hereby certify that this day a copy of the foregoing was deposited in the United States Post Office, first class mail, postage prepaid, addressed to the following:

Robert D. Bradshaw, Plaintiff *pro se*
P.O. Box 473
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DATED: August 10, 2006

/s/ Rowena de Vera

ROWENA DE VERA